

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ROGER ANDERSON,

Plaintiff,

v.

PHILL KLINE, et al.,

Defendants.

CIVIL ACTION

No. 04-3432-KHV

ORDER

Plaintiff, an inmate at the Winfield Correctional Facility in Winfield, Kansas, brings suit against Phill Kline, Attorney General of the State of Kansas, Roger Werholtz, Secretary of the Kansas Department of Corrections (“KDOC”) and “13 un-named conspirators.” Plaintiff alleges that Internal Management Policy and Procedure (“IMPP”) § 04-106 – which provides that outstanding fees from a previous incarceration or post-incarceration supervision shall be assessed upon the offender’s re-entry into KDOC custody – violates his rights under the due process clause of the Fourteenth Amendment of the United States and Kansas Constitutions.

Because plaintiff proceeds *in forma pauperis*, the Court reviews the complaint *sua sponte* to ensure that it states a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii); Curley v. Perry, 246 F.3d 1278, 1284 (10th Cir.) (*sua sponte* dismissal under Rule 12(b)(6) or Section 1915(e)(2)(B)(ii) of meritless claim without opportunity to amend does not violate due process or unduly

burden plaintiff's right of access to courts), cert. denied, 534 U.S. 922 (2001).¹

Plaintiff alleges that acting under IMPP § 04-106, defendants took the following amounts from his inmate trust account without his authorization: \$17.46 on December 23, 2003; \$20.00 on January 6, 2004; \$5.40 on April 23, 2004; \$12.00 on May 21, 2004; \$12.00 on June 18, 2004; and \$13.20 on July 16, 2004. Plaintiff does not allege the particular purpose of each deduction, but IMPP § 04-106 authorizes KDOC to collect outstanding fees, fines and other payments in the following order: postage for legal mail; urinalysis fees; administrative fees; medical fees; supervision fees; fines; disciplinary restitution; room, board and transportation while employed by a private industry; work release loans and other expenses related to work release; crime victims or court ordered restitution obligations while employed by a private industry or on work release; and state or federal initial or frivolous filing fees. See IMPP § 04-106, effective from November 21, 2003 through November 6, 2004, attached as Exhibit D to Defendants' Response To The Court's November 23, 2004 Order To Supplement The Record With IMPP 04-106 in Miller v. Sebelius, No. 04-3053-KHV.

Liberally construed, plaintiff's complaint asserts both procedural and substantive due process claims.² In Miller v. Sebelius, No. 04-3053-KHV, plaintiff alleged that KDOC officials violated his

¹ On February 4, 2005, the Honorable G.T. VanBebber of this Court held in this case that defendants must respond to plaintiff's claims against them in their individual capacity. See Order (Doc. #6) at 2. That same day, Judge VanBebber transferred the case to the undersigned judge for all further proceedings. In light of two cases which the undersigned judge has recently decided, see Memorandum And Order (Doc. #45) filed December 22, 2004 in Miller v. Sebelius, No. 04-3053-KHV; Memorandum And Order (Doc. #49) filed December 29, 2004 in Taylor v. Sebelius, No. 04-3063-KHV, the Court finds it necessary to consider again whether the complaint states a claim on which relief may be granted.

² Plaintiff also alleges a conspiracy, but he cites only the underlying due process violations. Absent a claim for violation of his due process rights, he cannot state a conspiracy claim.

procedural and substantive due process rights when they deducted outstanding supervision fees under IMPP § 04-106. This Court held that plaintiff in that case had failed to state a claim. See Memorandum And Order (Doc. #45) filed December 22, 2004. Likewise, in this case, plaintiff's general challenge to IMPP § 04-106 fails to state a claim.

I. Procedural Due Process

Plaintiff alleges that by taking money from his inmate trust account without notice and an opportunity to be heard, defendants denied him procedural due process. See Complaint (Doc. #1) at 2; Supplement at 1, attached as Exhibit A to Complaint (Doc. #1). Plaintiff's complaint is too vague and conclusory to state a claim for violation of his constitutional right to procedural due process. Plaintiff has a property interest in the money in his inmate account, Elliott v. Simmons, 100 Fed. Appx. 777, 779 (10th Cir. June 7, 2004), but he does not set forth specific federal, state or constitutional procedural safeguards that defendants allegedly violated. See Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504, 519-20 (10th Cir. 1998) (procedural due process claim must set forth procedures due under law). Plaintiff has not alleged that IMPP § 04-106 requires defendants to follow certain state procedures in collecting outstanding fees from inmates in state custody. Absent an allegation that defendants violated applicable procedural safeguards, plaintiff does not state a claim for violation of his procedural due process rights. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (*pro se* plaintiff must allege sufficient facts on which recognized legal claim could be based; conclusory allegations without supporting factual averments insufficient).

To the extent plaintiff attempts to challenge the fact that KDOC does not grant a pre-deprivation hearing, he does not state a claim. In determining what process is due, courts must balance (1) the private

interests that will be affected by the official action, (2) the risk of erroneous deprivation, and (3) the government's interest, including the fiscal and administrative costs of additional process. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). As to the first factor, the private interest that is affected is plaintiff's interest in avoiding an erroneous assessment of the various fees, fines and other payments authorized to be collected from his inmate trust account. Such an interest is not compelling because plaintiff has an opportunity to contest an erroneous assessment through the prison grievance process and KDOC provides free items and services to indigent inmates (such as basic hygiene supplies, medical care, writing supplies and postage). See Mackey v. Montrym, 443 U.S. 1, 2 (1979) (interest in continued possession and use of driver's license, pending outcome of hearing, not compelling in light of further post-suspension hearing and limit of 90-day suspension). As to the risk of erroneous deprivation, the collection of fees, fines and other payments involves routine matters of accounting with a low risk of error. See Tillman v. Lebanon County Corr. Facility, 221 F.3d 410, 422 (3d Cir. 2000) (collection of fees from inmates for cost of housing). In addition, before an individual is re-incarcerated, he receives notice of the assessment of supervision fees. See IMPP § 14-107 (probation officer must give offender notice and pre-printed envelope for payment of supervision fees). IMPP § 04-103 also requires that each offender be provided a listing of any outstanding fees as part of the Inmate Trust Fund Accounting Report. See IMPP § 04-106. Because plaintiff has not alleged that he lacked notice of the outstanding fees and obligations and the collection of outstanding obligations involves routine matters of accounting, the risk of erroneous deprivation is minimal.

As for the third factor, the Court must consider both the government interest in the policy that the state action advances and the government interest in minimizing administrative and fiscal burdens.

Mathews, 424 U.S. at 335. Here, the collection of various fees and payments advances a policy of offender accountability and rehabilitation, and reimburses the State of Kansas for services provided. To require a pre-deprivation hearing before the collection of outstanding fees (of which the offender has prior notice) would substantially increase the burdens of enforcement. See Tillman, 221 F.3d at 422 (no pre-deprivation proceeding required for deduction of room and board fees from inmate account; proceeding would be impractical, significantly increase transaction costs and hinder correctional facility's ability to reduce costs of incarceration).

Plaintiff has not alleged that the prison grievance program is inadequate to address erroneous assessments to his inmate account. See Elliott, 100 Fed. Appx. at 779 (prison grievance procedures sufficient to satisfy procedural due process for erroneous assessments on inmate account); Tillman, 221 F.3d at 422 (same); see also Smith v. Colo. Dep't of Corrs., 23 F.3d 339 (10th Cir. 1994) (due process satisfied when adequate post-deprivation remedy exists); Winters v. Bd. of County Comm'rs, 4 F.3d 848, 856 (10th Cir. 1993) (deprivation of procedural due process not complete unless and until state fails to provide adequate constitutionally essential procedures), cert. denied, 511 U.S. 1031 (1994); Woodley v. Dep't of Corrs., 74 F. Supp.2d 623, 627 (E.D. Va. 1999) (rejecting due process challenge based on payment of supervision costs). Therefore the Court dismisses plaintiff's procedural due process claim for failure to state a claim on which relief can be granted.

II. Substantive Due Process

"The touchstone of due process is protection of the individual against arbitrary action of government," Wolff v. McDonnell, 418 U.S. 539, 558 (1974), including the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, e.g., Daniels v. Williams,

474 U.S. 327, 331 (1986) (substantive due process protects against government power arbitrarily and oppressively exercised); County Of Sacramento v. Lewis, 523 U.S. 833, 846 (1998). In cases of “abusive executive action,” only the most egregious official conduct can be said to be “arbitrary in the constitutional sense.” Id. at 849 (citing Collins v. City Of Harker Heights, 503 U.S. 115, 129 (1992)).

The standard for judging a substantive due process claim is whether the challenged government action would “shock the conscience of federal judges.” Tonkovich, 159 F.3d at 528 (quoting Uhlrig v. Harder, 64 F.3d 567, 573 (10th Cir.1995), cert. denied, 516 U.S. 1118 (1996)). To satisfy this standard, “a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power.” Id. at 574. Instead, a plaintiff “must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.” Id. Generally conscience shocking behavior falls on the far side of the culpability spectrum, requiring the plaintiff to show that the government actor performed with an intent to harm. In Radecki v. Barela, 146 F.3d 1227 (10th Cir.1998), cert. denied, 525 U.S. 1103 (1999), the Tenth Circuit expanded this narrow reading, holding that “[w]here the state actor has the luxury to truly deliberate about the decisions he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience.” Id. at 1232.

Deducting outstanding fees and fines from an inmate trust account without a hearing before each deduction does not “shock the conscience” of this federal judge. Such conduct cannot be considered as abusive or outrageous. Cf. Rochin v. California, 342 U.S. 165 (1952) (invasion of one’s body, such as pumping suspect’s stomach, will “shock the conscience”). Because defendants’ alleged conduct is not so egregious as to “shock the conscience,” the Court dismisses plaintiff’s substantive due process claim under

Rule 12(b)(6). See Taylor v. R.I. Dep't of Corrs., 908 F. Supp. 92, 107 (D.R.I. 1995) (no substantive due process violation based on deduction from inmate account for unpaid supervision fees), rev'd on other grounds by 101 F.3d 780, 783-84 (1st Cir. 1996).

IT IS THEREFORE ORDERED that under Rule 12(b)(6), Fed. R. Civ. P., and 28 U.S.C. § 1915(e)(2)(B)(ii), plaintiff's complaint is dismissed for failure to state a claim on which relief may be granted.

Dated this 10th day of February, 2005 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge